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MMIP SERVICES SDN BHD v. OVERSEAS ASSURANCE CORPORATION (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[CIVIL SUIT NO: 22NCC-121-05-2015]
7 MARCH 2016

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CIVIL PROCEDURE: *Locus standi – Want of authority – Plaintiff appointed as administration manager of Malaysian Motor Insurance Pool – Plaintiff sued defendant for breach of High Risks Motor Insurance Pool Collective Agreement ('CA') – Whether plaintiff party to CA – Whether plaintiff had power to sue in its own name – Whether plaintiff agent for parties to CA – Whether CA expressly provided for specific mechanism of enforcement – Whether action an abuse of court process*

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CIVIL PROCEDURE: *Striking out – Action – Whether statement of claim disclosed causes of action – Whether plaintiff had power to sue in its own name – Whether suit an abuse of court process – Whether application to strike out could succeed – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

D

CIVIL PROCEDURE: *Third party proceedings – Third party notice – Application to strike out – Whether third party notice lawfully issued under O. 16 r. 1(1)(c) of Rules of Court 2012 – Whether questions posed in third party notice unsustainable or unarguable – Whether an abuse of process of court – Whether there was duplicity with arbitral proceedings and third party proceedings – Whether ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a)*

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The motor insurance companies, including the defendant and TIMB, entered into a High Risks Motor Insurance Pool Collective Agreement ('CA'). Clause 8.1 of the CA provided that the administration manager 'shall be appointed by the council on behalf of the parties' to the CA. The Malaysian National Reinsurance Bhd was first appointed to be the administration manager of the Malaysian Motor Insurance Pool ('MMIP') and entered into a 'management agreement' with all the parties to the CA ('MA'). The MA provided, *inter alia*, that the administration manager 'shall act as an agent of the parties hereto in respect of the administration and business of the pool' and that the council was empowered by the parties to the MA to 'direct' the administration manager. On 23 March 2006, the plaintiff took over as the administration manager of the MIMP Pool. The defendant and Tahan Insurance Malaysia Bhd ('TIMB') entered into a business portfolio transfer agreement ('BPTA') and obtained a High Court's confirmation order. By a letter dated 31 January 2011, the defendant informed that pursuant to the High Court's confirmation order, TIMB's general insurance business had been transferred to the defendant and that the accounts maintained by TIMB 'shall be deemed transferred' to the defendant with effect from 1 January 2011. The plaintiff's financial statements as at 31 December 2010 revealed

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that the plaintiff had suffered losses for the year ending 31 December 2010 for which each party to the CA, including the defendant and TIMB, were equally liable. A sum of RM4,666,989 ('the sum') was required to be paid by each party to the CA for the losses. The plaintiff demanded for the defendant to pay the sum on behalf of TIMB but the defendant had failed to do so. Therefore, the plaintiff instituted the present suit ('the suit') against the defendant on the grounds, *inter alia*: (i) pursuant to the High Court's confirmation order, with effect from the transfer date, the defendant had assumed all of TIMB's liabilities; (ii) the defendant's letter dated 31 January 2011 had informed the plaintiff that TIMB's general business had been transferred to the defendant and the accounts maintained under TIMB 'shall be deemed to be transferred to the defendant' with effect from 1 January 2011. The defendant's failure to pay the sum on behalf of TIMB thus, constituted a breach of the defendant's 'representation' contained in the defendant's letter dated 31 January 2011; (iii) the defendant had breached the CA by failing to pay the sum to the plaintiff on behalf of TIMB; and (iv) the defendant had contravened, among others, ss. 129(1)(d), (4) and 135(1) of the Insurance Act 1996 ('the IA') in not paying the sum to the plaintiff on behalf of TIMB. On 18 June 2015, the defendant issued a third party notice to TIMB. The third party notice required four questions to be determined not only as between the plaintiff and the defendant but also as between either or both the plaintiff and the defendant and TIMB ('the four questions'). The four questions concerned, among others, were whether the defendant had assumed TIMB's liability under the High Court's confirmation order. The defendant filed an application to strike out the suit under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 ('ROC') and/or under the court's inherent jurisdiction (encl. 6). On the other hand, TIMB filed an application against the defendant under O. 12 r. 10(1)(a), (g), O. 18 r. 19(1)(a) of the ROC and/or under the court's inherent jurisdiction (encl. 8), *inter alia*, that : (i) the third party notice be struck out; (ii) the service of the third party notice by the defendant on TIMB be set aside; (iii) the defendant's claim against TIMB did not disclose any reasonable cause of action, was misconceived as this court had no jurisdiction to decide on the third party notice, was defective and was without basis. The issues that arose for the court's determination were, *inter alia*, (i) whether the plaintiff had *locus standi* to file the suit; (ii) whether the defendant assumed TIMB's liability under BPTA; (iii) the effect of the High Court's confirmation order; (iv) whether the defendant was liable in respect of the letter dated 31 January 2011; (v) whether TIMB could rely on O. 18 r. 19(1)(a) of the ROC to strike out the third party notice; and (vi) whether the court was deprived of jurisdiction by the arbitration agreement. TIMB submitted that pursuant to cl. 31 of the BPTA ('arbitration agreement'), the court had no jurisdiction to decide the third party notice under art. 121 of the Federal Constitution ('FC') read with ss. 8, 9 and 10 of the Arbitration Act 2005 ('AA').

Held (allowing encl. 6 with costs; dismissing encl. 8 with costs):

(1) The SOC disclosed three causes of action against the defendant, namely: (i) by virtue of the High Court's confirmation order, the defendant had assumed TIMB's liability; (ii) the defendant's letter dated 31 January 2012 had represented to the plaintiff that the TIMB's accounts had been transferred to the defendant; and (iii) the defendant had contravened ss. 129(1)(d), (4) and 135(1) of the IA. On the face of the SOC, the first inquiry was resolved in favour of the plaintiff. Accordingly, encl. 6 could not succeed under O. 18 r. 19(1)(a) of the ROC. (paras 20 & 21)

(2) The plaintiff had no right and/or power to file the suit in the plaintiff's own name. The plaintiff was not a party to the CA and therefore, by virtue of the doctrine of privity of contract, the plaintiff had no right to sue the defendant based on the CA. Further, based on cls. 8.1, 8.2 and cl. 3 of the MA, the plaintiff was an 'agent' for the parties to the CA and the parties to the CA were the plaintiff's 'principal' within the meaning of s. 135 of the CA. There was no room to apply any exception for the plaintiff to file the suit in the plaintiff's name as an agent for the parties to the CA. Any enforcement of the CA could only be filed by way of a legal action in the name of the parties to the CA. Further, the CA did not provide any right and/or power for the plaintiff to file the suit, let alone to institute the suit in the plaintiff's name. The CA also had expressly provided for a specific mechanism to enforce the CA when there was a withdrawing party such as TIMB. (para 23)

(3) The parties to the CA had manifestly intended for the mechanism to enforce the CA to be mandatory. Such manifest intention was clear from the use of the imperative term 'shall' in cls. 5.2, 5.3, 5.4 and 5.5 of the CA. Furthermore, cl. 5.5 overrides all other provisions in the CA by virtue of the phrase 'notwithstanding any provisions' in the CA. Even if there is a conflict between cls. 5.2 to 5.5 with any other provision in the CA, cls. 5.2 to 5.5 should be preferred by reason of the application of canon of construction, '*generalia specialibus non derogant*'. Hence, based on cls. 5.2 to 5.4, the plaintiff had no right or power to file the suit. Therefore, the suit was an abuse of court process and should be struck out under O. 18 r. 19(1)(d), O. 92 r. 4 of the ROC and pursuant to the court's inherent jurisdiction. (paras 23 & 25)

(4) The defendant did not assume TIMB's liability under the BPTA. The BPTA provided for a 'scheme' to transfer 'sale assets' and 'sale liabilities' as at transfer date from TIMB to the defendant. 'Sale assets' meant 'all titles, rights, interests and benefits attached thereto, of whatever nature' vested in TIMB as at transfer date. The meaning of 'sale assets' did not include any liability of TIMB. Further the

definition of 'sale liabilities' did not include any reference to TIMB's liability. In fact, no reference at all had been made to the MMIP pool in the comprehensive meaning of 'sale liabilities'. (para 26)

(5) It is clear from s. 133(3) of the IA, the High Court's 'confirmation order' is wider than a 'vesting order' because the High Court may refuse to confirm the scheme or confirm the scheme with or without modification. Hence, the use of the term 'confirmation order' of the High Court is more apt than a 'vesting order'. The BPTA had been confirmed by the High Court's confirmation order without any modification. As the defendant did not assume TIMB's liability under the BPTA, the defendant could not be liable for TIMB's liability. Therefore, the plaintiff had no cause of action against the defendant based on the High Court's confirmation order. (paras 30 & 31)

(6) The plaintiff pleaded that the defendant had contravened ss. 129(1)(d), (4) and 135(1) of the IA. The plaintiff could not rely on the provisions of the IA to sustain the suit on the reasons, *inter alia*, (i) the IA only provided for TIMB as a transferor to obtain both Bank Negara Malaysia's ('BNM') approval and the High Court's confirmation order for the BPTA. There was no onus on the defendant as a transferee to obtain both BNM's approval and the High Court's confirmation order for the BPTA. The confirmation proceedings had been filed by TIMB and not by the defendant; (ii) there was no evidence that the defendant has breached any provision in the IA; and (iii) even if it was assumed that the defendant had breached ss. 129(1)(d), (4) and 135(1) of the IA, such a breach in itself does not confer a cause of action in the plaintiff to file this suit. (para 31)

(7) As the BPTA and the High Court's confirmation order did not vest TIMB's liability in the defendant, the plaintiff had no valid cause of action against the defendant. As such, the plaintiff could not rely on the equitable estoppel doctrine by way of the defendant's letter dated 31 January 2011 against the defendant. Consequently, the suit should be struck out on the grounds, *inter alia*, that the suit was frivolous and/or vexatious within the meaning of O. 18 r. 19(1)(b) of the ROC; and/or that the suit constituted an abuse of court process under O. 18 r. 19(1)(d), O. 92 r. 4 of the ROC and under the court's inherent jurisdiction. (paras 36 & 38)

(8) Based on case authorities, TIMB may apply under O. 18 r. 19(1)(a) of the ROC to strike out the third party notice. However, in applying O. 18 r. 19(1)(a) of the ROC, neither the defendant nor TIMB could rely on affidavit evidence. In this case, the third party notice had been lawfully issued under O. 16 r. 1(1)(c) of the ROC. As the questions posed in the third party notice were not obviously unsustainable or unarguable, it could not be struck out under O. 18 r. 19(1)(a) of the ROC. (paras 48, 49 & 51)

(9) The third party notice did not constitute an abuse of court process under O. 18 r. 19(1)(d) of the ROC, amongst others, because the arbitral proceedings concerned the IBNR issue, which was different from the four questions raised by the defendant in the third party notice. As such, there was no duplicity in the form of the arbitral proceedings and the third party proceedings. TIMB relied on ss. 8 and 10(1) of the AA. However, s. 8 of the AA does not apply in this case as the case did not concern the AA. Further, as the arbitration agreement could not apply to the question on the effect of the High Court's confirmation order, s. 10(1) of the AA had no relevance to the third party notice. Even if the arbitration agreement applied to the four questions, TIMB could only apply to stay the third party proceedings under s. 10(1) of the AA and not to strike out the third party notice. (paras 53 & 56)

(10) Based on art. 121(1) of the Federal Constitution read with s. 23(1)(a) to (d) of the Courts of Judicature Act 1964, the High Court has jurisdiction to hear the third party proceedings and such a jurisdiction is not ousted by the arbitration agreement. Section 10(1) of the AA recognises the High Court's jurisdiction to stay a suit and refer the parties to arbitration if the suit concerns a matter which is the subject of an arbitration agreement. In the circumstances, TIMB's contention that the court has no jurisdiction to decide on the third party proceedings due to the existence of the arbitration agreement was rejected. (paras 59 & 60)

Case(s) referred to:

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18 FC ***(refd)***

AmBank (M) Bhd v. Kamariyah Hamdan & Anor [2013] 5 MLJ 448 ***(foll)***

Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor [2007] 2 CLJ 405 ***(foll)***

Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors [2008] 5 CLJ 654 HC ***(refd)***

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1984] 2 CLJ 169; [1984] 1 CLJ (Rep) 482 HC ***(dist)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Capping Corporation Ltd & Ors v. Aquawalk Sdn Bhd & Ors [2013] 1 LNS 574 CA ***(refd)***

CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd [2015] 1 LNS 149 HC ***(dist)***

Curtis v. Stovin (1889) LR 22 QBD 513 ***(refd)***

Green Valley Resources lwn. Shop Apartment Antilia Joint Management Body [2014] 1 LNS 905 HC ***(refd)***

Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Lee Kuan Yew v. Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties) [1993] 1 SLR 723 ***(refd)***
Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja [2000] 3 CLJ 81 FC ***(refd)***
Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA ***(refd)***
Montgomerie & Ors v. United Kingdom Mutual Steamship Association (1891) 1 QB 370 ***(foll)***
PA (GI) Ltd v. GICL 2013 Ltd & Anor [2015] EWHC 1556 (Ch) ***(refd)***
Pacific Asia Leasing (M) Sdn Bhd v. Senanti Motors Sdn Bhd & Anor [1992] 3 CLJ 1621; [1992] 3 CLJ (Rep) 184 HC ***(refd)***
Pancaran Gayabina Sdn Bhd v. Chew Yong See [2015] 1 LNS 188 HC ***(refd)***
Paul Murugesu Ponnusamy Sebagai Wakil Nalamah Sangapillay (P) (Simati) v. Cheok Toh Gong & Ors [1996] 2 CLJ 397 SC ***(refd)***
Pilot Cargo (M) Sdn Bhd & Anor v. Adinas Tour & Travel Sdn Bhd & Ors [2002] 6 CLJ 442 HC ***(dist)***
Qatar Islamic Bank v. Asian Finance Bank Bhd & Ors [2014] 1 LNS 1106 HC ***(refd)***
Re Cavell Insurance Co Ltd [2008] FCA 1984 ***(refd)***
See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***
Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair @ Ahmad Zubir Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties) [2012] 9 MLJ 464 ***(refd)***
Sungai Lidong Co-operative Land Development Society Ltd v. Lim Jok Teck & Anor [2009] 9 CLJ 264 HC ***(refd)***
Suwiri Sdn Bhd v. Government Of The State of Sabah [2008] 1 CLJ 123 FC ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v. Kerajaan Negeri Selangor [2013] 1 LNS 1301 CA ***(foll)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
Teng Sung @ Siew Kam Lian v. Soon Kon Yin [2013] 1 LNS 159 HC ***(dist)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***
Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***
Yugen (M) Sdn Bhd v. Lin Kee Yi @ Kurt Lin & Anor [1995] 1 LNS 386 HC ***(dist)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 9(1), 10(1)
Contracts Act 1950, s. 135
Evidence Act 1950, ss. 91, 92
Federal Constitution, arts. 121(1), 160(2)
Financial Services Act 2013, ss. 2(1), 100, 101, 102, 103, 104, 105, 106, 107, 271
Insurance Act 1996 (since repealed), ss. 127, 128(1), 129(1)(d), (4), 130, 133(1), (2), (3), (4), 134(1)(a), (2), 135(1)(a), (b)
Rules of Court 2012, O. 1 r. 4(1), O. 12 r. 10(1)(a), (g), (2), (5), (6), (7), O. 16 rr. 1(1)(a), (b), (c), 6, O. 18 r. 19(1)(a), (b), (d), (2), (3), O. 92 r. 4
Rules of the High Court 1980, O. 16 r. 1(1)(c)

Financial Services and Markets Act 2000 [UK], ss. 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114
Insurance Act 1973 [Aus], s. 17G
Long-Term Insurance Act 1998 [S Africa], s. 40(1)

For the plaintiff - Sreether Sundaram; M/s Murali B Pillai & Assocs
For the defendant - M Nagarajah (Michael Anthony with him); M/s Shook Lin & Bok
For the 3rd party - Mohaji Selamat; M/s Mohaji, Hazury & Ismail

Reported by S Barathi

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This suit (this suit) concerns, among others, the following issues:

(i) whether the plaintiff company (plaintiff), an "Administration Manager" of the "Malaysian Motor Insurance Pool" (MMIP pool), has the right and/or power to file this suit in the plaintiff's own name to enforce the "High Risks Motor Insurance Pool Collective Agreement" dated 16 November 1992 (CA) when, among others:

(a) The plaintiff is not a party to the CA;

(b) The plaintiff as an agent cannot file this suit in the plaintiff's name on behalf of the plaintiff's principal;

(c) The CA does not provide any right and/or power for the plaintiff to file this suit; and

(d) The CA has expressly provided for a specific mechanism to enforce the CA by parties specified in the CA;

(ii) whether the liability of the third party in this suit (Tahan Insurance Malaysia Bhd (TIMB)) to make contributions to the MMIP pool under the CA (TIMB's liability) had been assumed by the defendant company (defendant) by reason of the "business portfolio transfer agreement" dated 18 August 2012 (BPTA) between the defendant and TIMB;

(iii) whether the High Court's order dated 15 October 2010 confirming the BPTA (High Court's confirmation order) under ss. 128(1), 133(3), (4) and 135(1)(b) of the then applicable Insurance Act 1996 (IA), had vested the TIMB's liability in the defendant;

(iv) whether the plaintiff can rely on a letter from the defendant and the wide application of the equitable estoppel doctrine to constitute a cause of action against the defendant;

(v) whether TIMB can rely on O. 12 r. 10(1)(a) and (g) of the Rules of Court 2012 (RC) to set aside the service of the third party notice issued by the defendant to TIMB (third party notice); A

(vi) whether TIMB can strike out the third party notice under O. 18 r. 19(1)(a) of the RC; and B

(vii) if an arbitration agreement applies in a case, does such an application deprive the court of jurisdiction to try the case?

Background

[2] The CA was entered into by motor insurance companies, including the defendant and TIMB. According to the CA, among others: C

(i) before the conclusion of the CA, all the parties to the CA, defined in cl. 1 CA to be the "general body", had been operating an "unplaced motor pool" pursuant to the "unplaced motor pool agreement" (first pool agreement) wherein parties to the first pool agreement had provided on a collective basis, insurance for motor vehicles which could not readily find an insurer in the Malaysian general insurance market – recital to the CA (recital); D

(ii) the CA recorded the intention of the general body to replace the unplaced motor pool with the MMIP pool by a more comprehensive agreement (namely the CA) and the CA was intended to be a continuation of the first pool agreement – recital; E

(iii) members of a "Council" shall be elected by parties to the CA at a general body meeting and shall consist of either the "principal officers" or general managers of the parties to the CA – cl. 9.1 CA (cl. 9.1) regarding the Council: F

(a) clause 9.7 CA (cl. 9.7) states that the Council is "vested with all powers to act on behalf of the parties hereto in all matters relating to the pool except to the extent such powers are reserved to be exercised by the general body"; G

(b) the Council has the power to "commence ... any actions, suits or other proceedings against ... any person, firm, company in respect of any matters or things relating to the conduct, business, contracts or dealings arising from or in connection with the pool" – cl. 9.5(e) CA (Clause 9.5(e)); and H

(c) clause 9.5(g) CA (cl. 9.5(g)) provides power to the Council to "delegate to any person any of its functions, responsibilities and powers upon such terms and conditions as (the Council) deems fit";

(iv) clause 8.1 CA (cl. 8.1) provides that the administration manager "shall be appointed by the Council on behalf of the parties" to the CA. Under cl. 8.2 (cl. 8.2), the "Council is further empowered by the parties I

herein to direct, supervise, remunerate and terminate the services of the administration manager on behalf of the parties". The administration manager "shall *inter alia* deal with the administration, record keeping, accounts, investment of the funds of the (MMIP pool), claims, negotiations and settlements and to carry out all such other functions and duties which the Council may assign to it" – cl. 8.3 CA;

(v) clause 8.4 CA provides that the terms and basis of the appointment of the administration manager by the Council shall include, among others, matters provided in paras. (a) to (h). According to cl. 8.4(h) CA (cl. 8.4(h)), the administration manager "shall accept service of any writ of summons or any cause papers on behalf of the parties hereto and to take such action in defence of any legal action taken against the parties hereto subject to the guidance and direction of the Council". The proviso to cl. 8.4 CA states that the Council may vary, delete or add to any of the terms provided in cl. 8.4(a) to (h) CA as the Council deems fit and proper;

(vi) the Council shall appoint a "Servicing Insurer" under cl. 6.1 CA to carry on the business of the MMIP pool – cl. 6.3 CA;

(vii) all insurance policies underwritten by the servicing insurer shall be undertaken on behalf of the parties to the CA on an equal sharing basis as co-insurers and shall be pooled together in the books of the administration manager – cl. 7.1 CA;

(viii) the liabilities of the parties to the CA in respect of any policy underwritten by the servicing insurer shall be several in nature and each party to the CA shall be responsible for all the liabilities arising from its share or portion of the policy underwritten on its behalf – cl. 7.3 CA (cl. 7.3). Clause 7.3 is subject to cl. 5.5.CA (cl. 5.5) which I will explain below;

(ix) expenses incurred by the Council, audit fees, internal audit expenses and secretarial expenses in connection with the meetings of the Council and the general body shall be charged to the MMIP pool account – cl. 12.3 CA;

(x) any bad debt arising out of the business of the MMIP pool shall be shared among the parties to the CA in proportion to their participation in the MMIP pool in the year to which the bad debt relate – cl. 14 CA; and

(xi) clause 5.1 CA allows a party to CA to withdraw from the CA when the party has permanently and irrevocably ceased to underwrite general insurance business (withdrawing party). Regarding the withdrawing party:

(a) under cl. 5.2 CA, the Council "shall have the absolute discretion" to work out the terms and basis of the portfolio withdrawal of the withdrawing party (withdrawal portfolio) which "shall be binding" on the withdrawing party (cl. 5.2);

(b) clause 5.3 CA (cl. 5.3) provides that the withdrawal portfolio "shall be shared by all the remaining parties in equal proportions or on such alternative basis as may be adopted in accordance with cl. 17.2". Clause 17.2 CA (cl. 17.2) states in paras. (a), (b) and (c) that certain resolutions require a two-third majority of the total number of parties to the CA;

(c) according to cl. 5.4 CA (cl. 5.4):

(i) the failure of the withdrawing party to comply with the terms of the withdrawal portfolio "shall be deemed to be a breach" of the CA and "shall render the withdrawing party liable for damages to the remaining parties or to any persons aggrieved"; and

(ii) a certificate issued by the Council stating the quantum of liability payable by the withdrawing party "shall be deemed conclusive and binding in any legal proceedings against the withdrawing party"; and

(d) Clause 5.5 CA provides that:

(i) notwithstanding any provision in the CA, in the event the withdrawing party fails to comply by the terms of the withdrawal portfolio, the remaining parties to the CA "shall contribute in equal shares or on such alternative basis as may be adopted in accordance with cl. 17.2 the amount which the withdrawing party would otherwise be liable to pay as the Council may determine pursuant to cls. 5.1 and 5.2"; and

(ii) the remaining parties "shall *inter alia* have recourse against the withdrawing party in accordance with cl. 5.4".

The importance of cl. 5.5 is demonstrated by the use of the phrase "notwithstanding any provision herein" in that provision. Furthermore, cl. 7.3 is expressly subject to cl. 5.5.

[3] Malaysian National Reinsurance Bhd (MNRB) was first appointed to be the administration manager of the MMIP pool.

[4] MNRB entered into a "management agreement" dated 9 August 1993 with all the parties to the CA (MA). The MA provided, among others, as follows:

(i) the administration manager "shall act as an agent of the parties hereto in respect of the administration and business of the pool" – cl. 3 MA;

(ii) the Council is empowered by the parties to the MA to "direct" the administration manager – cl. 4.1 MA;

(iii) the administration manager "shall report to and take all instructions from the Council" – cl. 4.3; and

(iv) clause 6 MA provided that the functions and duties of the administration manager "shall *inter alia* include the following":

(a) The administration manager will not settle any balances to the parties to the MA based on the quarterly accounts. If the balance of the quarterly accounts is negative, "the manager shall have the option either to require the parties hereto to contribute their due shares of the deficit or to carry it forward" – cl. 6(d) MA;

(b) The administration manager "shall accept service of any writ of summons or any cause papers on behalf of the parties hereto and to take such action in defence of any legal action taken against the parties hereto subject to the guidance and direction of the Council" – cl. 6(g) MA;

(c) Under cl. 6(k)(i) MA, the administration manager undertakes to refer to the Council on all matters specified by the Council as requiring the Council's advice and to follow the Council's instructions on such matters; and

(d) the proviso to cl. 6 MA states that the Council may vary, delete or add to any of the functions and duties of the administration manager as provided in cls. 6(a) to (n) as the Council deems fit and proper, after consultation with the agreement of the administration manager.

[5] On 23 March 2006, the plaintiff took over as the administration manager of the MMIP pool.

[6] The defendant and TIMB entered into the BPTA on 18 August 2010 and the High Court's confirmation order had been obtained on 15 October 2010.

[7] By a letter dated 31 January 2011 (defendant's letter dated 31 January 2011), the defendant informed that pursuant to the High Court's confirmation order:

(i) TIMB's general insurance business had been transferred to the defendant;

(ii) the account(s) maintained by TIMB "shall be deemed transferred" to the defendant with effect from 1 January 2011 (transfer date); and

(iii) the defendant stated that "We would appreciate it if you could please liaise directly with Ms Ng Yean Mun at 03 27861162 on all future correspondences in respect of (TIMB's) statement of accounts.

[8] The plaintiff's financial statements as at 31 December 2010 revealed that the plaintiff had suffered losses for the year ending 31 December 2010 (2010 losses) for which each party to the CA, including the defendant and TIMB, were equally liable. A sum of RM4,666,989 (sum) was required to be paid by each party to the CA for the 2010 losses.

[9] The plaintiff replied to the defendant's letter dated 31 January 2011 by way of a letter dated 16 May 2012 (plaintiff's letter dated 16 May 2012). The plaintiff's letter dated 16 May 2012:

(i) stated that since the transfer date, the sum was due from TIMB to the MMIP pool; and

(ii) requested for the defendant to pay the sum.

Attached to the plaintiff's letter dated 16 May 2012 was a "certificate" regarding the sum being due from TIMB to the MMIP pool.

[10] The plaintiff claimed in this suit that the defendant was liable to pay the sum on behalf of TIMB. The plaintiff had demanded for the defendant to pay the sum on behalf of TIMB but the defendant had failed to do so.

This Suit

[11] In this suit, the plaintiff's statement of claim (SOC) pleaded, among others, the following averments:

(i) pursuant to the High Court's confirmation order, with effect from the transfer date, the defendant had assumed all of TIMB's liabilities. The plaintiff has described the High Court's confirmation order as a "vesting order". I will explain later in this judgment on the appropriateness of using the term "vesting order". I will continue to use the term "High Court's confirmation order" in this judgment;

(ii) the defendant's letter dated 31 January 2011 had informed the plaintiff that TIMB's general business had been transferred to the defendant and the accounts maintained under TIMB "shall be deemed to be transferred to the defendant" with effect from 1 January 2011. The defendant's failure to pay the sum on behalf of TIMB, constituted a breach of the defendant's "representation" contained in the defendant's letter dated 31 January 2011;

(iii) the defendant had breached the CA by failing to pay the sum to the plaintiff on behalf of TIMB; and

(iv) the defendant had contravened, among others, ss. 129(1)(d), (4) and 135(1) of the IA in not paying the sum to the plaintiff on behalf of TIMB.

[12] Based on the four grounds pleaded in the SOC, the plaintiff prayed for, among others, the following relief against the defendant:

(i) judgment against the defendant for the sum;

(ii) interest on the sum at the rate of 5% per annum from 1 January 2011 until the date of full payment of the sum; and

(iii) costs of this suit.

[13] On 18 June 2015, the defendant issued the third party notice to TIMB. The third party notice required four questions to be determined not only as between the plaintiff and the defendant but also as between either or both the plaintiff and the defendant and TIMB (four questions). The four questions are as follows:

(i) whether by virtue of the BPTA and the High Court's confirmation order, the alleged liability regarding the sum (subject liability) which was incurred by TIMB, to the MMIP pool prior to the transfer date was assumed, acquired and/or amalgamated with the defendant's own liabilities, obligations, debts and duties at the transfer date?;

(ii) whether the subject liability may be deemed a liability and/or obligation and/or debt which was transferred from TIMB to the defendant when, under the BPTA (as consequently endorsed by the High Court's confirmation order), TIMB had agreed that "sale assets" comprised "net assets in (MMIP pool) ...?;

(iii) whether the subject liability may be deemed a liability and/or obligation and/or debt which was transferred from TIMB to the defendant when, under the BPTA (as consequently endorsed by the High Court's confirmation order), TIMB had omitted, failed and/or neglected to include the subject liability as an express and/or implied term under the definition of "sale liabilities"?; and

(iv) whether TIMB, by reserving and/or appropriating the sum of RM845,000 in TIMB's books and/or accounts towards the subject liability (which ultimately proved insufficient), had by that aforesaid conduct, acknowledged and/or accepted and/or assumed absolutely?

Two Striking Out Applications

[14] The defendant filed an application to strike out this suit under O. 18 r. 19(1)(a), (b), (d) of the RC and/or under the court's inherent jurisdiction (court encl. No. 6). It is to be noted that in court encl. No. 6, in respect of O. 18 r. 19(1)(b) of the RC, the defendant only relies on the ground that this suit is frivolous and/or vexatious. The defendant has not contended that this suit is scandalous under O. 18 r. 19(1)(b) of the RC.

[15] An application had been filed by TIMB for the following relief, among others, against the defendant under O. 12 r. 10(1)(a), (g), O. 18 r. 19(1)(a) of the RC and/or under the court's inherent jurisdiction (court encl. No. 8):

(i) the third party notice be struck out;

(ii) the service of the third party notice by the defendant on TIMB be set aside;

(iii) the defendant's claim against TIMB:

(a) Did not disclose any reasonable cause of action;

(b) Was misconceived as this court had no jurisdiction to decide the third party notice;

(c) Was defective; and

(d) Was without basis

- and should therefore be struck out;

(iv) all proceedings in this suit be stayed, except court encl. No. 8, pending the hearing of court encl. No. 8; and

(v) costs for court encl. No. 8 to be paid forthwith by the defendant to TIMB on an indemnity basis.

Court Encl. No. 6

[16] In determining court encl. No. 6, the following trite principles of law apply:

(a) A pleading can only be struck out in a plain and obvious case, namely where that pleading is obviously unsustainable – please see the Supreme Court's judgment delivered by Mohd Dzaiddin SCJ (as he then was) in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at 43;

(b) The mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out that pleading – *Bandar Builder Sdn Bhd*, at p. 44; and

(c) Under O. 18 r. 19(1) of the RC, in the interest of justice the court has a discretion to direct a pleading to be amended – please see the Court of Appeal's judgment given by Mahadev Shankar JCA in *Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417; [1997] 1 MLJ 557, at 560 and 561.

[17] If a striking out application has been made under O. 18 r. 19(1)(a) of the RC, the court cannot consider affidavit evidence under O. 18 r. 19(2) of the RC – please see the Court of Appeal's judgment delivered by Ramly Ali JCA (as he then was) in *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235, at 241. As court encl. No. 6 is also based on O. 18 r. 19(1)(b), (d) of the RC and/or the court's inherent jurisdiction, namely this suit is frivolous, vexatious and/or an abuse of court process, I can consider affidavits filed by the plaintiff and defendant in deciding court encl. No. 6 on those grounds. In the circumstances, I will adopt the following approach in deciding court encl. No. 6:

(i) the first inquiry is to peruse the SOC without considering any affidavit filed by the plaintiff and defendant (according to O. 18 r. 19(2) of the RC) to decide whether the SOC discloses any reasonable cause of action against the defendant within the meaning of O. 18 r. 19(1)(a) of the RC (first inquiry). In the first inquiry, I will assume that the contents of the SOC are true – please see the Court of Appeal's judgment given by Mahadev Shankar JCA in *Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, at 679;

(ii) if the SOC discloses no reasonable cause of action against the defendant, the first inquiry is resolved in favour of the defendant and this suit should be struck out on this ground alone under O. 18 r. 19(1)(a) of the RC;

(iii) if the SOC discloses a reasonable cause of action against the defendant, the first inquiry is concluded in the plaintiff's favour and the court will then consider all the affidavit evidence filed by the plaintiff and defendant in court encl. No. 6 to decide whether this suit:

(a) Is frivolous and/or vexatious as understood in O. 18 r. 19(1)(b); and/or

(b) Constitutes an abuse of court process under O. 18 r. 19(1)(d), O. 92 r. 4 of the RC and/or under the court's inherent jurisdiction

(second inquiry); and

(iv) if the second inquiry is answered in favour of the plaintiff, court encl. No. 6 should be dismissed with costs. If however the second inquiry is resolved in the defendant's favour, this suit should be struck out on any one or more of the grounds stated in O. 18 r. 19(1)(b) (defendant did not allege that this suit is scandalous but only averred that this suit was frivolous and/or vexatious), O. 18 r. 19(1)(d), O. 92 r. 4 of the RC and/or pursuant to the court's inherent jurisdiction.

Submission Of Parties In Court Encl. No. 6

[18] The defendant's learned counsel advanced the following contentions to support court encl. No. 6:

(i) the plaintiff had no *locus standi* under the CA or MA to commence this suit against the defendant;

(ii) the mechanism under cl. 5.5 should have been resorted to instead of filing this suit;

(iii) neither BPTA nor the High Court's confirmation order states that the defendant is responsible for TIMB's liability. The defendant's learned counsel has cited the following provisions in the insurance legislation of South Africa, Australia and the United Kingdom (UK) as follows:

(a) Section 40(1) of the Republic of South Africa's Long-term Insurance Act 1998 (LTIA);

(b) Section 17G of the Australian Insurance Act 1973 [IA (Australia)] as interpreted by the Federal Court of Australia in *Re Cavell Insurance Co Ltd* [2008] FCA 1984; and

(c) Sections 104 to 114 of UK's Financial Services and Markets Act 2000 [FSMA (UK)]. The defendant also relied on the English High Court's judgment in *PA (GI) Ltd v. GICL 2013 Ltd & Anor* [2015] EWHC 1556 (Ch); and

(iv) TIMB had sent a letter dated 21 January 2011 to the defendant (TIMB's letter dated 21 January 2011) which enclosed the unaudited "management accounts" of TIMB for the month of December 2010 (TIMB's unaudited accounts for December 2010). In TIMB's unaudited accounts for December 2010, TIMB had made a provision (without the defendant's in-put) for the MMIP pool in the sum of RM845,000. As such, TIMB had admitted liability to the MMIP pool in TIMB's unaudited accounts for December 2010.

[19] In opposing court encl. No. 6, the plaintiff's learned counsel contends as follows:

(i) the defendant had assumed TIMB's liability by virtue of the BPTA and the High Court's confirmation order. The plaintiff relied on the following parts of the High Court's confirmation order:

(a) The definition of "sale liabilities" in para. 1, in particular sub-paras. (ii) and (iii);

(b) Sub-paras. 2.2(a) and (b); and

(c) Paragraph 5(i).

The following High Court's decisions had been cited by the plaintiff's learned counsel:

(a) VC George J's (as he then was) judgment in *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors* [1984] 2 CLJ 169; [1984] 1 CLJ (Rep) 482;

(b) Low Hop Bing JC's (as he then was) decision in *Yugen (M) Sdn Bhd v. Lin Kee Yi @ Kurt Lin & Anor* [1995] 1 LNS 386; [1995] MLJU 274;

(c) the judgment of Kang Hwee Gee J (as he then was) in *Pilot Cargo (M) Sdn Bhd & Anor v. Adinas Tour & Travel Sdn Bhd & Ors* [2002] 6 CLJ 442; [2002] MLJU 6;

(d) the decision of Lee Swee Seng JC (as he then was) in *Teng Sung @ Siew Kam Lian v. Soon Kon Yin* [2013] 1 LNS 159; and

(e) Mary Lim Thiam Suan J's judgment in *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] 1 LNS 149;

(ii) the defendant had represented to the plaintiff in the defendant's letter dated 31 January 2011 that pursuant to the High Court's confirmation order:

(a) TIMB's general insurance business had been transferred to the defendant with effect from the transfer date; and

(b) The accounts maintained under TIMB "shall be deemed transferred" to the defendant with effect from the transfer date.

The plaintiff contended that the defendant is estopped by the defendant's letter dated 31 January 2011 from denying liability to the plaintiff in this suit;

(iii) the plaintiff had the *locus standi* to file this suit as the Council had knowledge of this suit. The Council had no objection to the plaintiff commencing this suit as the administrator of the MMIP Pool. The plaintiff exhibited a document dated 10 August 2015 from the Chairman of the MMIP pool, Mr Kong Shu Yin (Council's statement dated 10 August 2015), which stated, among others, as follows:

> This is to confirm that the [Council] had at all times full knowledge that [Plaintiff], as the administrators of the [MMIP Pool]:
>
> (a) were trying to recover [the Sum] due and owing from [Defendant] to [Plaintiff];
>
> (b) were going to commence legal proceedings against the [Defendant] in their name and capacity as administrators for [MMIP Pool]; and
>
> (c) had subsequently commenced [This Suit] in their name and capacity as administrators for [MMIP Pool].
>
> The Council had consented to the same and had no objections thereto. The Administrators' actions are in line with the requirements of the Council; and

(iv) TIMB's liability was not a withdrawal portfolio but was a debt due and owing from TIMB as at 31 December 2000 and such a debt had been 'fully taken over' by the defendant by virtue of the BPTA and the High Court's confirmation order.

First Inquiry

[20] Without considering affidavit evidence, the SOC disclosed three causes of action against the defendant, namely:

(a) By virtue of the High Court's confirmation order, the defendant had assumed TIMB's liability;

(b) The defendant's letter dated 31 January 2012 had represented to the plaintiff that the TIMB's accounts had been transferred to the defendant; and

(c) The defendant had contravened ss. 129(1)(d), (4) and 135(1) of the IA.

[21] On the face of the SOC, the first inquiry must be resolved in favour of the plaintiff. Accordingly, court encl. No. 6 cannot succeed under O. 18 r. 19(1)(a) of the RC.

Second Inquiry

Does Plaintiff Have Locus Standi To File This Suit?

[22] The question that arises is whether the plaintiff has the right and/or power to file this suit in the plaintiff's name to enforce the CA against the defendant.

[23] I am of the view that the plaintiff has no right and/or power to file this suit in the plaintiff's own name for any one or more of the following four reasons:

(i) the plaintiff is not a party to the CA. By virtue of the doctrine of privity of contract, the plaintiff has no right to sue the defendant based on the CA. The doctrine of privity of contract has been affirmed by the three following decisions of our apex courts:

(a) The Privy Council's decision delivered by Lord Wilberforce in an appeal from Malaysia, *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, at 174;

(b) The judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, at 431; and

(c) The Federal Court's judgment delivered by Ahmad Fairuz CJ in *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743, at 751-752.

In *Pancaran Gayabina Sdn Bhd v. Chew Yong See* [2015] 1 LNS 188; [2015] 3 AMR 480, at para. 20, I held as follows:

> 20. ...
>
> *Kepong Prospecting Ltd affirms the doctrine of privity of contract in CA. According to Kepong Prospecting Ltd, a person who has provided a valid consideration under s 2(d) CA cannot enforce a contract if the person is not a party to the contract. It is to be noted that the following countries have passed legislation which confers a right on a person who is not a party to a contract (Third Party) to enforce the contract if the contract expressly provides that the Third Party may do so or if the contract confers a benefit on the Third Party:*
>
> (1) **the New Zealand Parliament has passed the Contracts (Privity) Act 1982 (CPA)**; and
>
> (2) *the United Kingdom (UK) Parliament has legislated the Contracts (Rights of Third Parties) Act 1999 (CRTPA). It is to be noted that the CRTPA applies to England, Wales and Northern Ireland only.*

A *Malaysia has no legislation equivalent to CPA and CRTPA which constitute statutory exceptions to the doctrine of privity of contract in New Zealand and UK respectively.*

(emphasis added);

B It is clear in Malaysia that there is no statutory exception to the doctrine of privity of contract, to allow the plaintiff to sue in the plaintiff's name to enforce the CA when the plaintiff is not a party to the CA;

(ii) Section 135 of the Contracts Act 1950 (CA (1950)) provides as follows:

"**Agent**" and "**principal**"

C 135. *An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".*

(emphasis added).

D It is clear from cls. 8.1 and 8.2 as well as cl. 3 MA that:

(a) The plaintiff is an "agent" for the parties to the CA; and

(b) The parties to the CA are the plaintiff's "principal"

- within the meaning of s. 135 of the CA (1950).

E Based on cls. 8.1 and 8.2 as well as cl. 3 MA, the Council cannot be the plaintiff's "principal". There is an additional reason why the Council cannot be the "principal" of the plaintiff. This is because the Council is not a legal or juridical person who can sue and be sued in the Council's own name. The Council is only appointed by the general body under cl. 9.1 to act in respect F of the MMIP pool. Any entity which is constituted by a private contract, deed, trust or document, is not a legal or juridical entity recognised by law. As the Council is not a legal or juridical person, the Council can only sue in the name of the parties to the CA. As such, cl. 9.5(e) which empowers the Council to "commence and prosecute ... any actions, suits or other G proceedings against ... any person, firm, company in respect of any matters or things relating to the conduct, business, contracts or dealings arising from or in connection with the pool", can only enable the Council to file an action in the name of the parties to the CA. This is because cl. 9.5(e), like any contractual provision, cannot confer legal or juridical personality on the H Council.

There is a general rule that an agent cannot sue in the agent's name in respect of a contract to which the principal is a party. This is clear from the following cases:

I (i) in the English High Court case of *Montgomerie & Ors v. United Kingdom Mutual Steamship Association* (1891) 1 QB 370, at 371-372, Wright J (as he then was) decided as follows:

> *There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and, prima facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal. To that rule there are, of course, many exceptions.* First, the agent may be added as the party to the contract if he has so contracted, and is appointed as the party to be sued. Secondly, the principal may be excluded in several other cases. He may be excluded if the contract is made by a deed *inter partes*, to which the principal is no party. In that case, by ancient rule of common law, it does not matter whether the person made a party is or is not an agent. This, however, does not apply here, as this instrument is a deed-poll. Another exception is as regards bills and notes. If a person who is an agent makes himself a party in writing to a bill or note, by the law merchant a principal cannot be added. Another exception is that by usage, which is treated as forming part of the contract or of the law merchant, where there is a foreign principal, generally speaking the agent in England is the party to the contract, and not the foreign principal; but this is subject to certain limitations. Then a principal's liability may be limited, though not excluded. If the other party elects to sue the agent, he cannot afterwards sue the principal. Again, where the principal is an undisclosed principal, he must, if he sues, accept the facts as he finds them at the date of his disclosure, so far as those facts are consistent with reasonable and proper conduct on the part of the other party. Again, if the principal is sued, he is entitled to an allowance for payments which he may have made to his agent if the other party gave credit originally to that agent. Also, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.

(emphasis added).

In this case, there is no room to apply any exception as explained in *Montgomerie* for the plaintiff to file this suit in the plaintiff's name as an agent for the parties to the CA; and

(ii) *Montgomerie* has been followed by our Court of Appeal in *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2007] 2 CLJ 405; [2007] 2 MLJ 12 (*Andrew Christopher Chuah*). In *Andrew Christopher Chuah*, at p. 22, Augustine Paul JCA (as he then was) held as follows:

> [18] As a matter of fact exhs 'AC-6' and 'AC-7' in the affidavit affirmed by the appellant on 16 May 2001 reveal that with regard to the loan of USD3.8m the securities furnished by the third parties had been taken into account by the appellant in calculating the amount due. Thus, the real borrowers are the third parties of which the appellant was aware. *It is therefore clear that LSSB acted only as an agent for the real borrowers to the knowledge of the appellant. There is therefore privity of contract between the real*

borrowers, who are the principals, and the appellant. In accordance with the principle of law in Montgomerie & Ors v. United Kingdom Mutual Steamship Association (1891) 1 QB 370 such a contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal. This rule is embodied in s 183 of our Contracts Act 1950 and was considered in Plantation Agencies Sdn Bhd v. Haji Ariffin bin Haji Ismail [1978] 1 MLJ 219. LSSB is thus not a debtor of the appellant.

(emphasis added).

Based on *Montgomerie* and *Andrew Christopher Chuah*, any enforcement of the CA can only be filed by way of a legal action in the name of the parties to the CA (not in the name of the plaintiff);

(iii) clause 9.5(e) has explicitly provided for the Council (not the plaintiff) to sue. I have explained above why the Council can only commence any legal action in the name of the parties to the CA.

Clause 8.4(h) has clearly stated that the plaintiff "shall accept service of any writ of summons or any cause papers on behalf of the parties hereto and to take such action in defence of any legal action taken against the parties hereto subject to the guidance and direction of the Council". Clause 8.4(h) does not allow the plaintiff to sue, let alone, to sue in the name of the plaintiff. The wording of cl. 8.4(h) attracts the application of the maxim of construction, *expressio unius est exclusio alterius*, namely the express mention of one matter, implies the exclusion of matters which have not been mentioned. An application of this maxim is demonstrated in the Federal Court's judgment delivered by Nik Hashim FCJ in *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347; [2009] 4 MLJ 593, at 605-606. In *Curtis v. Stovin* (1889) LR 22 QBD 513, at 517, Bowen LJ in the English Court of Appeal has decided that rules for construing statutes also apply to the interpretation of documents.

Applying the maxim of *expressio unius est exclusio alterius* to cl. 8.4(h), the manifest intention of the parties to the CA is that the administration manager:

(a) Can only accept service of cause papers in a suit against the parties to the CA and defend such a suit subject to the guidance and direction of the Council; and

(b) Cannot file any suit in respect of the CA, even in the name of the parties to the CA.

The above construction of cls. 8.4(h) and 9.5(e) is fortified by cl. 6(g) MA (which is substantially similar to cl. 8.4(h)).

I have not overlooked cl. 9.5(g) which empowers the Council to delegate to any person any of the Council's functions, responsibilities and power. I am of the view that the plaintiff cannot rely on the Council's statement dated 10 August 2015 as a basis for the plaintiff to have instituted this suit. This decision is premised on the following reasons:

(a) the plaintiff cannot rely on the Council's statement dated 10 August 2015 to interpret cls. 8.4(h) and 9.5(e). This is because ss. 91 and 92 of the Evidence Act 1950 (EA) prohibit extrinsic evidence, such as the Council's statement dated 10 August 2015, from being adduced by any party, including the plaintiff, to contradict, vary, add to or subtract from the provisions of the CA – please see Chang Min Tat FJ's judgment in the Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, at 227-228;

(b) the Council is not a party to the CA. In fact, as elaborated above, the Council is not a legal or juridical person. As such, the Council cannot lawfully vary cls. 8.4(h) and 9.5(e). In any event, cl. 17.2(c) CA requires a two-third majority of the total number of parties to the CA for any amendment to the CA;

(c) the Council's statement dated 10 August 2015 did not amount to a delegation of the Council's power under cl. 9.5(g) to the plaintiff. No reference was made in the Council's statement dated 10 August 2015 to any delegation of the Council's powers under cl. 9.5(g); and

(d) this suit had been filed on 5 May 2015. The Council's statement dated 10 August 2015 was only made after court encl. No. 6 had been filed on 9 July 2015 and after the defendant had challenged the *locus standi* of the plaintiff to commence this suit. Clearly, the Council's statement dated 10 August 2015 was an afterthought in a belated attempt to confer *locus standi* on the plaintiff to file this suit.

In view of the above reasons, the CA does not provide any right and/or power for the plaintiff to file this suit, let alone to institute this suit in the plaintiff's name; and

(iv) the CA has expressly provided for a specific mechanism to enforce the CA as follows when there is a withdrawing party such as TIMB:

(a) Under cl. 5.2, the Council "shall" have the "absolute discretion" to decide the withdrawal portfolio which "shall be binding" on TIMB;

(b) As there no resolution under cl. 17.2 regarding TIMB's withdrawal portfolio, TIMB's withdrawal portfolio "shall be shared" by all the remaining parties (remaining parties) in equal proportions – cl. 5.3; and

(c) If TIMB fails to comply with TIMB's withdrawal portfolio:

(i) TIMB "shall be deemed" to have breached the CA and "shall" be liable for damages to the remaining parties or any aggrieved person – cl. 5.4;

(ii) the remaining parties "shall contribute in equal shares" the amount payable by TIMB and "shall have recourse" against TIMB – cls. 5.4 and 5.5; and

(iii) the Council may issue a certificate stating the quantum of liability payable by TIMB and this certificate "shall be deemed conclusive and binding in any legal proceedings" against TIMB – cl. 5.4.

I am of the view that the parties to the CA have manifestly intended for the above mechanism to be mandatory. Such a manifest intention is clear from the use of the imperative term "shall" in cls. 5.2, 5.3, 5.4 and 5.5. Furthermore, cl. 5.5 overrides all other provisions in the CA by virtue of the phrase "notwithstanding any provisions" in the CA. Even if there is a conflict between cls. 5.2 to 5.5 with any other provision in the CA, cls. 5.2 to 5.5 should be preferred by reason of the application of canon of construction, "*generalia specialibus non derogant*". According to this canon of interpretation, "*generalia specialibus non derogant*", if there is a conflict between two provisions in the same document, the specific provision should prevail over the general provision. I have applied this canon of construction in interpreting a company's articles of association in *Qatar Islamic Bank v. Asian Finance Bank Bhd & Ors* [2014] 1 LNS 1106; [2015] 7 MLJ 445, at para. 42(b)(iii).

Based on cls. 5.2 to 5.4, the plaintiff had no right or power to file this suit.

[24] The cases relied on by the plaintiff (plaintiff's cases) can be easily distinguished from this suit on either one or both of the following grounds:

(i) the plaintiff's cases did not concern an agent commencing the legal suit in the agent's own name; and/or

(ii) there was no agreement in the plaintiff's cases which had provisions similar to cls. 5.2 to 5.4, cls. 8.4(h) and 9.5(e) which applied in this case.

[25] If the plaintiff does not have any right and/or power to file this suit in the plaintiff's own name by reason of one or more of the above four grounds, this suit constitutes an abuse of court process and should be struck out under O. 18 r. 19(1)(d), O. 92 r. 4 and pursuant to the court's inherent jurisdiction. I rely on the Federal Court's judgment delivered by Abdul

Malek Ahmad FCJ (as he then was) in *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 CLJ 81; [2000] 3 MLJ 65, at 80, as follows:

> *We feel that no purpose would be served by ordering further proceedings to continue as the respondent clearly has no locus standi to bring an umbrella action on behalf of all its members on their respective individual contracts with their employer, the appellant, for which different individual considerations are relevant and applicable. We are unanimously of the view that both the High Court and the Court of Appeal adopted the wrong approach to an O. 18 r. 19 application because with the respondent having no capacity to sue in the first place, the originating summons simply cannot stand and, therefore, it falls under the category of a case which is obviously unsustainable. Technically, this, of course, does not prevent the employees from bringing actions themselves in their names separately or together.*
>
> (emphasis added).

Did Defendant Assume TIMB's Liability Under BPTA?

[26] I am of the view that the defendant did not assume TIMB's liability under the BPTA. This view is premised on the following provisions in the BPTA:

(i) the BPTA provided for a "scheme" to transfer "sale assets" and "sale liabilities" as at transfer date from TIMB to the defendant;

(ii) "Sale assets" meant "all titles, rights, interests and benefits attached thereto, of whatever nature" vested in TIMB as at transfer date. The definition of "sale assets" included in sub-para. (i)(c) "other receivables comprising net assets" in the MMIP pool.

It is clear that this definition of "sale assets" excludes TIMB's liability because "sale assets" concerned solely "titles, rights, interests and benefits" as well as "net assets" of TIMB. The meaning of "sale assets" does not include any liability of TIMB, let alone TIMB's liability; and

(iii) "Sale liabilities":

(a) meant liabilities "with respect only" to the "policies" on the transfer date. "Policies" had been defined to include "all and/or any general insurance policies/policy and all and/or any other general insurance business product(s), including all and/or any product(s) available only as an accessory product to a main insurance policy, that are/is accepted and legally underwritten by TIMB as part of its business, whether valid and existing or since expired, as the case may be, on the transfer date". "Business" meant the general insurance business of TIMB, as approved by the Minister for Finance and which was carried on in Malaysia, which included all or any of the following:

(i) receiving proposals for insurance cover in connection with "policies";

(ii) issuing of "policies";

(iii) collection or receipt of premiums on the "policies"; or

(iv) settlement or recovery of claims on the "policies"; and

(b) excluded "PRAD" and provision for claims expenses under the "Risk Based Capital Framework". "PRAD" meant an amount held as a provision of risk margin and for adverse deviation at the 75% probability of adequacy.

The above definition of "sale liabilities" did not include any reference to TIMB's liability. In fact, no reference at all had been made to the MMIP pool in the comprehensive meaning of "sale liabilities".

Effect Of High Court's Confirmation Order

[27] Sections 128(1), 129(1), (4), 130, 133 and 135(1) of the IA provide as follows:

128(1) *A transferor's insurance business, wholly or partly, may be transferred to a transferee by a scheme approved by the Bank [Bank Negara Malaysia (BNM)] and confirmed by the Court.*

129(1) **The transferor, before making an application to the Court, shall submit to the [BNM], in such manner as the [BNM] may specify:**

(a) the draft scheme;

(b) the consent of the transferee to the scheme;

(c) a certified copy of its accounts, and in the case of transfer of life business, a valuation report on which the scheme is based; and

(d) **confirmation of the transferee that policy owners, claimants and other creditors shall not be affected adversely following the transfer.**

129(4) *In the case of a transfer of general business, the scheme shall provide that the transferee shall assume liability for claims which have been incurred but not yet reported, in addition to liabilities on reported claims and other liabilities shown in its balance sheet.*

130 **[BNM] may reject the scheme or approve it with such modification as it may specify.**

133(1) **The transferor shall present a petition to the Court for confirmation of the scheme as approved by [BNM].**

133(2) *An application to the Court with respect to any matter connected with the scheme may be made by a person, who in the opinion of the Court, is likely to be affected by the scheme, at any time before confirmation of the scheme by the Court.*

133(3) **The Court may refuse to confirm the scheme or may confirm it with or without modification.**

133(4) *When confirming the scheme, the Court shall fix the effective date of transfer after hearing all parties concerned and the transfer shall be binding on all persons affected by it.*

135(1) **The Court's confirmation of the scheme shall have the effect of:**

(a) *vesting the transferor's rights and title to the assets transferred by the scheme in the transferee without the need to effect the transfer of rights and title to each asset individually;* and

(b) *making the transferee fully responsible for liabilities transferred by the scheme whether arising out of policies or otherwise as though the liabilities were originally assumed by the transferee without the need for the transferee to confirm each liability individually.*

(emphasis added).

[28] The IA has been repealed by the Financial Services Act 2013 (FSA) - please see s. 271 of the FSA. Sections 100 to 107 of the FSA currently provide for a scheme to transfer business of a "licensed person" (defined in s. 2(1) of the FSA).

[29] The effect of IA in respect of a scheme to transfer an insurance business, in my opinion, is as follows:

(i) the scheme must first obtain BNM's approval – ss. 128(1) and 130 of the IA. BNM may specify that the "transferor" (defined in s. 127 of the IA as an insurer which transfers its insurance business to a "transferee" (also defined in s. 127 of the IA as a company, including a licensed insurer, to which the insurance business of a licensed insurer is transferred)) must confirm that the policy owners, claimants and other creditors of the transferor "shall not be affected adversely" by the transfer – s. 129(1)(d) of the IA. According to s. 129(4) of the IA, in the case of a transfer of a general business, the scheme shall provide that the transferee shall assume liability for claims which have been incurred but not yet reported, in addition to liabilities on reported claims and other liabilities shown in the transferee's balance sheet;

(ii) upon BNM's approval for the scheme, the transferor shall apply to the High Court to confirm the scheme (confirmation proceedings) – s. 133(1) of the IA. When confirmation proceedings have been filed by the transferor:

(a) The transferor shall, among others, deliver a copy of the confirmation proceedings to BNM – s. 134(1)(a) of the IA. Section 134(2) IA entitles BNM to be heard in the confirmation proceedings and to call, examine and cross-examine a witness;

(b) Any person who is "likely to be affected by the scheme" may, at any time before confirmation of the scheme by the High Court, make an application in the confirmation proceedings "with respect to any matter connected with the scheme" – s. 133(2) of the IA; and

(c) Under s. 133(3) of the IA, the High Court may:

(i) refuse to confirm the scheme; or

(ii) confirm the scheme with or without modification. If the High Court confirms the scheme, the High Court shall fix an effective date of the transfer and the transfer shall bind all persons affected by the scheme – s. 133(4) of the IA; and

(iii) if the High Court confirms a scheme, the High Court's confirmation has the following effect:

(a) The transferor's rights and title to the assets transferred by the scheme, shall be vested in the transferee without the need to effect the transfer of rights and title to each asset individually – s. 135(1)(a) of the IA; and

(b) the transferee shall be fully responsible for liabilities transferred by the scheme whether arising out of policies or otherwise as though the liabilities were originally assumed by the transferee without the need for the transferee to confirm each liability individually – s. 135(1)(b) of the IA.

[30] It is clear from s. 133(3) of the IA, the High Court's "confirmation order" is wider than a "vesting order" because the High Court may refuse to confirm the scheme or confirm the scheme with or without modification. Hence, the use of the term "confirmation order" of the High Court is more apt than a "vesting order".

[31] Based on the above provisions of the IA, I am of the following view:

(i) in this case, the BPTA had been confirmed by the High Court's confirmation order without any modification. If BPTA had been confirmed by the High Court's confirmation order without any modification, s. 135(1)(b) of the IA would make the defendant fully responsible for liabilities transferred by the scheme whether arising out of policies or otherwise as though the liabilities were originally assumed by the defendant without the need for the defendant to confirm each liability individually.

As explained in the above para. 26, the defendant did not assume TIMB's liability under the BPTA. Accordingly, since the High Court's confirmation order did not modify the BPTA, the defendant could not be liable for the TIMB's liability (which fell outside the scope of the BPTA). It is therefore clear that the plaintiff has no cause of action against the defendant based on the High Court's confirmation order;

(ii) the SOC has pleaded that the defendant has contravened ss. 129(1)(d), (4) and 135(1) of the IA. With respect, the plaintiff cannot rely on those provisions in the IA to sustain this suit. This decision is based on the following reasons:

(a) As elaborated above, the IA only provided for TIMB as a transferor to obtain both BNM's approval (BNM's approval) and the High Court's confirmation order for the BPTA. There is no onus on the defendant as a transferee to obtain both BNM's approval and the High Court's confirmation order for the BPTA. In fact, the confirmation proceedings had been filed by TIMB and not by the defendant;

(b) There is no evidence that the defendant has breached any provision in the IA; and

(c) Even if it is assumed that the defendant has breached ss. 129(1)(d), (4) and 135(1) of the IA, such a breach in itself does not confer a cause of action in the plaintiff to file this suit; and

(iii) the remaining parties had not applied in the confirmation proceedings under s. 133(2) of the IA for the High Court to approve the BPTA with a modification that the defendant would assume TIMB's liability. Nor did the plaintiff applied in the name of the remaining parties under s. 133(2) of the IA in the confirmation proceedings. As explained above, the Council is not a legal or juridical person which can make an application under s. 133(2) of the IA.

[32] With respect to the defendant's submission on LTIA, IA (Australia) and FSMA (UK), these provisions from South Africa, Australia and UK are not similar to our then applicable IA. The schemes for transfer of insurance business in *Re Cavell Insurance Co Ltd* and *PA (GI) Ltd* were also different from this case.

Is Defendant Liable In Respect Of Defendant's Letter Dated 31 January 2011?

[33] The defendant's letter dated 31 January 2011, in my view, cannot assist the plaintiff for the following reasons:

(i) according to ss. 91 and 92 of the EA, the defendant's letter dated 31 January 2011 cannot contradict, vary, add to or subtract from the provisions of the BPTA – *Tindok Besar Estate Sdn Bhd*, at pp. 227-228. Similarly, ss. 91 and 92 of the EA will also prevent TIMB's letter dated 21 January 2011 and TIMB's unaudited accounts for December 2010 from being used by the defendant to interpret BPTA;

(ii) the BPTA can only be lawfully varied if there has been a bilateral variation of BPTA by both the defendant and TIMB as explained by Peh Swee Chin FCJ in the Supreme Court case of in *Paul Murugesu Ponnusamy Sebagai Wakil Nalamah Sangapillay (P) (Simati) v. Cheok Toh Gong & Ors* [1996] 2 CLJ 397; [1996] 1 MLJ 843, at 853. At the very most, the defendant's letter dated 31 January 2011 only amounts to a unilateral variation of BPTA which is not valid; and

(iii) the BPTA had been approved by BNM and confirmed by the High Court's confirmation order. Even if it is assumed that there has been a bilateral variation of the BPTA by both the defendant and TIMB in the defendant's letter dated 31 January 2011, such a bilateral variation of the BPTA (which is subsequent to the High Court's confirmation order), could not have any effect in light of BNM's approval and the High Court's confirmation order.

[34] The plaintiff's learned counsel had submitted that the defendant was estopped from denying the defendant's letter dated 31 January 2011. I am aware that our Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, has given a wide application to the doctrine of equitable estoppel. In *Boustead Trading (1985) Sdn Bhd*, at pp. 294 and 295, Gopal Sri Ram JCA's (as he then was) held as follows:

> *The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.*
>
> ...
>
> *We would add that it is wrong to apply the maxim "estoppel may be used as a shield but not a sword" as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it.*
>
> (emphasis added).

[35] I am of the following respectful view:

(i) in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207, at 219-220, Jeffrey Tan FCJ had explained a "cause of action" as follows:

> [12] *In Letang v. Cooper [1965] 1 QB 232, 242-3, Lord Diplock defined a 'cause of action' as "a factual situation the existence of which entitled one person to obtain from the court a remedy against another", which definition was adopted in Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230, *where Abdul Hamid Ag LP, as he then was, appended that "there must be a cause of action before a plaintiff can claim a relief in an action". In Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, 19, *the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', first, the plaintiff has a right at law or by statute and secondly, the right has been affected by the act of the defendant:*
>
> > *A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in Letang v. Cooper* [1965] 1 QB 232 at p 242 *defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first,*

the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

[13] *But other than that addendum by Salleh Abas CJ, the definition of 'cause of action' as expounded in Letang v. Cooper was readily adopted, by the former Supreme Court in Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474 and *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185, *and by the Court of Appeal in Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11, *Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee* [2010] 5 CLJ 23; [2010] 4 MLJ 762, *and Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192.

[14] *Other authorities, inter alia Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1997] 1 CLJ 463; [1996] 1 MLJ 661, *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 6 MLJ 507, *Goh Joon v. Kerajaan Negeri Johor & Ors* [1999] 5 CLJ 335; [1998] 7 MLJ 621, *applied the following definition found in Stroud's Judicial Dictionary 5th edn. at p. 378: "A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, Read v. Brown* [1889] 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643).

[15] **In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court per Gill FJ, as he then was, depicted 'a cause of action' as follows:**

A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher M.R. in Read v. Brown [1888] 22 QBD 128 131). ...

(emphasis added).

Despite the wide scope of application of equitable estoppel doctrine as expounded in *Boustead Trading (1985) Sdn Bhd*, a plaintiff has to satisfy this court that the plaintiff has a valid cause of action within the meaning explained in *Tenaga Nasional Bhd*. In other words, notwithstanding the width of the application of the equitable estoppel doctrine, such a doctrine cannot be a substitute for a valid cause of action; and

(ii) the above *dicta* in *Boustead Trading (1985) Sdn Bhd* regarding the fact that a plaintiff may resort to the application of the equitable estoppel doctrine, means that if a plaintiff has a valid cause of action, the plaintiff may rely on the equitable estoppel doctrine to support such a cause of action.

[36] As the BPTA and the High Court's confirmation order did not vest TIMB's liability in the defendant, the plaintiff had no valid cause of action against the defendant. As such, the plaintiff cannot rely on the equitable estoppel doctrine by way of the defendant's letter dated 31 January 2011 against the defendant.

Conclusion of Second Inquiry

[37] Based on the above reasons, the second inquiry is concluded as follows:

(i) the plaintiff has no *locus standi* to file this suit in the plaintiff's own name. On this ground alone, this suit constitutes an abuse of court process; and

(ii) the plaintiff has no cause of action against the defendant either by reason of the BPTA, the High Court's confirmation order, IA and/or the defendant's letter dated 31 January 2011. In *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240, at 244, the Federal Court in a judgment given by Abdoolcader J (as he then was) has held that when a plaintiff has no cause of action against a defendant, the plaintiff's suit is therefore vexatious, frivolous and an abuse of court process.

[38] In view of the two reasons stated in the above para. 37, the SOC cannot be saved by any amendment. Consequently, this suit should be struck out on either one or both of the following grounds:

(i) this suit is frivolous and/or vexatious within the meaning of O. 18 r. 19(1)(b) of the RC; and/or

(ii) this suit constitutes an abuse of court process under O. 18 r. 19(1)(d), O. 92 r. 4 of the RC and under the court's inherent jurisdiction.

Court encl. No. 8

[39] As this court has struck out this suit, the third party notice should also be consequently struck out. In the event that the Court of Appeal reverses my decision in respect of court encl. No. 6, I will now discuss the merits of court encl. No. 8.

Contentions Of Defendant And TIMB

[40] Learned counsel for TIMB had submitted as follows in support of court encl. No. 8:

(i) clause 31 BPTA (arbitration agreement) has provided that if there is any dispute between the defendant and TIMB, such a dispute "shall be referred to and finally resolved by arbitration" in Kuala Lumpur in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). In view of the arbitration agreement:

(a) this court has no jurisdiction to decide the third party notice under art. 121 of the Federal Constitution (FC) read with ss. 8, 9 and 10 of the Arbitration Act 2005 (AA). On this ground alone, the third party notice should be struck out under O. 12 r. 10(1)(g) and O. 18 r. 19(1)(a) of the RC; and

(b) the service of the third party notice by the defendant on TIMB should be set aside under O. 12 r. 10(1)(a) of the RC;

(ii) on 21 December 2011, TIMB had filed an Originating Summons No. 24NCC-428-12-2011 (OS) against the defendant in the Kuala Lumpur High Court (OS court). In the OS, TIMB had prayed for, among others, an order that the defendant to pay to TIMB a sum of RM21,767,723 (sum claimed by TIMB) with interest at 8% per annum from 1 January 2010 until full payment of the sum claimed by TIMB. The defendant had applied to the OS court and on 22 February 2012, had obtained an order from the OS court under s. 10 of the AA to stay the OS pending the reference of the dispute concerning the sum claimed by TIMB to arbitration (stay order dated 22 February 2012). The defendant then commenced arbitral proceedings in KLRCA against TIMB (arbitral proceedings) in respect of a dispute concerning the sum claimed by TIMB. At the time of this suit, the arbitral proceedings are still pending before the arbitral tribunal (arbitral tribunal). TIMB's learned counsel contends that by issuing the third party notice after the defendant has commenced arbitral proceedings, the defendant has abused court process in the sense that the defendant has caused a duplicity of proceedings, namely the arbitral proceedings and the third party proceedings against TIMB (third party proceedings); and

(iii) by obtaining the stay order dated 22 February 2012 and by instituting arbitral proceedings, the defendant is now estopped from issuing the third party notice to TIMB.

[41] In support of court encl. No. 8, TIMB relies on the following cases:

(i) the High Court case of *Sungai Lidong Co-operative Land Development Society Ltd v. Lim Jok Teck & Anor* [2009] 9 CLJ 264;

(ii) the Federal Court's decision in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289; [2003] 3 MLJ 705;

(iii) the High Court's judgment in *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors* [2008] 5 CLJ 654;

(iv) the judgment of the Federal Court in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18;

(v) the Court of Appeal case of *Capping Corporation Ltd & Ors v. Aquawalk Sdn Bhd & Ors* [2013] 1 LNS 574; and

(vi) the High Court's decision in *Green Valley Resources lwn. Shop Apartment Antilia Joint Management Body* [2014] 1 LNS 905.

[42] The defendant's learned counsel opposed court encl. No. 8 on these following grounds:

(i) TIMB cannot resort to O. 18 r. 19(1)(a) of the RC to strike out the third party notice. TIMB should have relied on O. 16 r. 6 of the RC to set aside the third party proceedings;

(ii) Order 12 r. 10(1) of the RC applies when a defendant has entered appearance and has filed the necessary application under O. 12 r. 10(1) of the RC within the time limited for serving a defence;

(iii) the OS and the arbitral proceedings concerned a dispute between the defendant and TIMB which arose from the BPTA regarding the sum claimed by TIMB, namely the value of "incurred but not reported" claim (IBNR issue). The IBNR issue was different from the four questions stated in the third party notice; and

(iv) in the arbitral proceedings, the defendant had applied to the arbitral tribunal on 23 December 2013 to determine that a preliminary issue, namely the issue regarding TIMB's liability to contribute to the MMIP pool, did not fall within the arbitral tribunal's jurisdiction (jurisdictional application). On 25 June 2014, the arbitral tribunal ruled that the jurisdictional application would be reserved for determination by the arbitral tribunal at the substantive hearing of the arbitral proceedings as part of the final award (arbitral tribunal's ruling dated 25 June 2014).

Order 12 r. 10(1)(a) And (g) RC Do Not Apply

[43] Order 12 r. 10 of the RC provides as follows:

Dispute as to jurisdiction

Order 12 rule 10(1)

A defendant who intends to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity as is mentioned in rule 9 or on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the Court for:

(a) **an order setting aside the writ or service of the writ on him;**

(b) an order declaring that the writ has not been duly served on him;

(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction;

(d) the discharge of any order extending the validity of the writ for the purpose of service;

(e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;

(f) the discharge of any order made to prevent any dealing with any property of the defendant;

(g) **a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action;** or

(h) such other relief as may be appropriate.

(2) *A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to the Court for an order to stay the proceedings.*

(3) An application under paragraph (1) or (2) shall be made by notice of application supported by an affidavit verifying the facts on which the application is based and a copy of the affidavit shall be served with the notice of application.

(4) Upon the hearing of an application under paragraph (1) or (2), the Court may make such order as it thinks fit and may give such directions for its disposal, as may be appropriate, including directions for the trial thereof as a preliminary issue.

(5) *A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having entered an appearance and if the Court makes no order on the application or dismisses it, paragraph (6) shall apply as if the defendant had not made any such application.*

(6) *Except where the defendant makes an application in accordance with paragraph (1), the appearance by a defendant shall, unless the appearance is withdrawn by leave of the Court under Order 21, rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings.*

(7) *Order 18, rule 2(1) does not apply to any defendant making an application under rule 1, unless the application is dismissed and, in which case, the defendant shall serve his defence within fourteen days after the dismissal of the application or within such other period as the Court may order.*

(emphasis added).

[44] It is clear that O. 12 r. 10 of the RC only applies to a proceeding requiring the party to enter appearance and to serve defence. This is clear from O. 12 r. 10(1), (2), (5), (6) and (7) of the RC. As such, I uphold the submission by the defendant's learned counsel that O. 12 r. 10(1)(a) and (g) of the RC do not support court encl. No. 8.

Can TIMB Rely On Order 18 r. 19(1)(a) RC To Strike Out Third Party Notice?

[45] The following provisions in the RC are relevant:

Definitions

Order 1 rule 4(1) **In these Rules, unless the context otherwise requires:**

...

"pleading" does not include a notice of application or a preliminary act;

Third party notice

Order 16 rule 1(1) **Where in any action a defendant who has entered an appearance:**

(a) claims against a person not already a party to the action any contribution or indemnity;

(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) *requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,*

then, subject to paragraph (2), the defendant may issue a notice in Form 18 or 19, whichever is appropriate (which is referred to as a "third party notice" in this Order), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

Setting aside third party proceedings

Order 16 rule 6 *Proceedings on a third party notice may, at any stage of the proceedings, be set aside by the Court.*

Striking out pleadings and endorsements

Order 18 rule 19(1) **The Court may at any stage of the proceedings order to be struck out** or amended **any pleading** or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) **it discloses no reasonable cause of action** or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) **No evidence shall be admissible on an application under subparagraph (1)(a).**

(3) **This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.**

(emphasis added).

[46] Firstly, O. 18 r. 19(1) of the RC applies to a "pleading". Unfortunately, the definition of "pleading" in O. 1 r. 4(1) of the RC does not state whether a third party notice constitutes a "pleading" or not. I am of the view that O. 18 r. 19(3) of the RC only extends the application of O. 18 r. 19(1) of the RC to originating summonses and not to third party notices. If the rules committee had intended to apply O. 18 r. 19(1) of the RC to third party notices, the rules committee could have easily included third party notices in O. 18 r. 19(3) of the RC. Furthermore, there is a specific provision in O. 16 r. 6 of the RC for a third party to apply to court to set aside third party proceedings. The above view is supported by the Shankar J's (as he then was) judgment in the High Court case of *Pacific Asia Leasing (M) Sdn Bhd v. Senanti Motors Sdn Bhd & Anor* [1992] 3 CLJ 1621; [1992] 3 CLJ (Rep) 184; [1992] 2 MLJ 364, at 367, 368 and 369, as follows:

> *This is an application to set aside a third party notice and to strike out a purported statement of claim filed by the second defendant against the third party.*
>
> ...
>
> **The summons-in-chambers had two prayers**. The first was pursuant to O 16 r 4(2) of the RHC. *The second prayer was to strike out a 'statement of claim' dated 24 April 1987 on the grounds set out in O 18 r 19(1) of the RHC, the chief of which is that it disclosed no reasonable cause of action.*
>
> *Having had the benefit of further arguments, I would observe as follows. The document dated 24 April 1987 was not a statement of claim. It was in fact the third party notice*. The rules require the use of Form 22 which requires the defendant to state the grounds of the claim. The third party's solicitors' description of the grounds in the notice as a 'statement of claim' is a misnomer.
>
> By consenting to the order on the summons for direction, the third party's solicitors acquiesced in the validity of the third party notice. A formal statement of claim was delivered on 11 July 1987 pursuant to the order for directions.
>
> *But to put an end to any further doubts as to the merits, I propose to treat the third party's objections under O 18 r 19 as being related to this statement of claim which is in very similar terms to the grounds referred to earlier.*
>
> ...
>
> Furthermore **the provisions of O 16 r 1(1)(c) of the RHC are very wide.**
> ...
>
> ...
>
> *In all the circumstances, I dismiss the third party's application (encl 22) with costs to be taxed and paid by the third party to the second defendant.*
>
> (emphasis added).

[47] Despite the above view, the following cases have decided that a third party may resort to O. 18 r. 19(1) of the RC to strike out a third party notice:

(i) the Court of Appeal's judgment delivered by David Wong JCA in *Syarikat Bekalan Air Selangor Sdn Bhd v. Kerajaan Negeri Selangor* [2013] 1 LNS 1301; [2014] 4 MLJ 147, at 150, as follows:

> [1] *This is an appeal against the decision of the High Court wherein the learned judicial commissioner upon an application by the third party respondent under O. 18 r. 19 of the RHC struck out the third party claim made by the appellant. The basis of the learned judicial commissioner's decision was that the third party claim did not raise any triable issue to warrant the court to order a trial of the same.*
>
> [2] *We heard the appeal and after due consideration of the submissions of respective counsel, we dismissed the appeal with costs. …*
>
> (emphasis added);

(ii) in *AmBank (M) Bhd v. Kamariyah Hamdan & Anor* [2013] 5 MLJ 448 and 464, Jeffrey Tan JCA (as he then was) delivered the following judgment of the Court of Appeal:

> [1] *This is an appeal against the order of the court below dated 9 February 2010, striking out the third party notice of the appellant (the second defendant below) against the respondents on the ground that whatever claims for contribution, indemnity, relief or other remedy against the respondent were statute barred.*
>
> ...
>
> [26] **For these reasons, we unanimously allow this appeal, and reinstate the third party notice.**
>
> (emphasis added);

(iii) Lee Swee Seng JC's (as he then was) decision in the High Court case of *Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair @ Ahmad Zubir Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464, at 472, 476, 507 and 509, as follows:

> [3] **There are two suits which applications by the third parties to set aside the third party notices** and statements of claim are being heard together. …
>
> ...
>
> [24] **The third parties through their various solicitors have applied through various summonses in chambers to strike out the third party notices and the third parties claim pursuant to O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of the High Court 1980** ('RHC') on the grounds that: ...

[136] **It was held in *Lee Kuan Yew v. Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties)*** [1993] 1 SLR 723 *that the principles applicable to an application to set aside a third party notice are the same as those governing the determination of an application to strike out a plaintiff's claim under O 18 r 19 or inherent jurisdiction of the court.*

...

[143] *Therefore the court struck out the third parties notices and the statements of claim filed by the first and second defendants against the third parties in both the suits.*

(emphasis added); and

(iv) in *Lee Kuan Yew v. Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties)* [1993] 1 SLR 723, at, LP Thean J (as he then was) held as follows in the Singapore High Court:

On 17 October 1991, the defendant took out a summons for third party directions, No 6843 of 1991, which was returnable on 18 November 1991. Prior to the return date, *STP [third party] took out an application by Summons-in-Chambers No 6848 of 1991, for an order that the third party notice issued pursuant to the order dated 7 August 1991 be set aside* or that the order of 7 August authorising the issue of the third party notice be discharged. That summons was returnable on 6 January 1992. Both the summonses were subsequently fixed for hearing on another date and were heard together before the assistant registrar. *At the conclusion of the hearing, the learned assistant registrar dismissed the application by STP and made an order for third party directions in terms of the application by the defendant. Against the decision of the learned assistant registrar on both the summonses STP appealed.*

The learned assistant registrar has given detailed reasons for his decision, which may be summarised as follows. First, he treated the third party procedure as analogous to a cause instituted by a defendant as the plaintiff against the third party as the defendant with the consequence that the third party may defend himself in any way in which a defendant in an action at the suit of the plaintiff may defend himself. Accordingly, he held that the application by STP to set aside the third party notice at the interlocutory stage was governed by the same principles applicable in an application by a defendant to strike out a statement of claim of the plaintiff under O 18 r 19 or the inherent jurisdiction of the court.
...

...

... There were two applications before the learned assistant registrar: the application by the defendant for third party directions and the application by STP for setting aside the third party notice or discharging the order for issue of the third party notice. He held that there was a question proper to be tried as to the liability of STP to make the contribution or indemnity claimed. I agree entirely with his conclusion.

(emphasis added).

[48] As a matter of *stare decisis*, I am bound by the Court of Appeal's judgments in *Syarikat Bekalan Air Selangor Sdn Bhd* and *Ambank (M) Bhd*. As such, TIMB may apply under O. 18 r. 19(1)(a) of the RC to strike out the third party notice.

TIMB Cannot Strike Out Third Party Notice

[49] In applying O. 18 r. 19(1)(a) of the RC, neither the defendant nor TIMB can rely on affidavit evidence – O. 18 r. 19(2) of the RC.

[50] In deciding whether a third party may strike out a third party notice under O. 18 r. 19(1) of the RC, I adopt the following approach:

(i) whether the third party notice has been lawfully issued under O. 16 r. 1(1)(a), (b) or (c) of the RC; and

(ii) if the third party notice has been lawfully issued under O. 16 r. 1(1)(a), (b) or (c) of the RC, the third party notice should not be struck out unless it is plain and obvious:

(a) that the third party notice *ex facie* is unsustainable or unarguable. A third party notice is obviously unsustainable if:

(i) there is no issue to be tried (please see *Syarikat Bekalan Air Selangor Sdn Bhd* and *Lee Kuan Yew*); or

(ii) there is no question which can and should be answered by the court; and

(b) the third party notice cannot be "saved" by any amendment by the defendant.

The third party notice should not be struck out merely because a defendant's third party claim is weak.

[51] In this case, the third party notice had been lawfully issued under O. 16 r. 1(1)(c) of the RC. In *Pacific Asia Leasing (M) Sdn Bhd*, at p. 368, the High Court has described the then O. 16 r. 1(1)(c) of the Rules of the High Court 1980 (in *pari materia* with O. 16 r. 1(1)(c) of the RC) as a "very wide" provision. The four questions posed in the third party notice are not obviously unsustainable or unarguable. Accordingly, this court cannot strike out the third party notice under O. 18 r. 19(1)(a) of the RC.

[52] For the avoidance of doubt, I will now consider whether the third party notice constitutes an abuse of court process under O. 18 r. 19(1)(d) and O. 92 r. 4 of the RC as well as under the court's inherent jurisdiction. For this purpose, affidavit evidence may be taken into account by the court.

[53] I am of the view that the third party notice does not constitute an abuse of court process. This view is based on the following reasons:

(i) I have perused the OS, TIMB's affidavit in support of the OS and the documents regarding the arbitral proceedings. The arbitral proceedings concern one issue in respect of the BPTA, namely the IBNR issue, which is different from the four questions raised by the defendant in the third party notice. As such, there is no duplicity in the form of the arbitral proceedings and the third party proceedings; and

(ii) the arbitration agreement applies solely in respect of "all disputes, controversies or differences which may arise out of, in relation to or in connection with" the BPTA. The four questions concerned, among others, whether the defendant had assumed TIMB's liability under the High Court's confirmation order (question on effect of High Court's confirmation order).

The question on effect of High Court's confirmation order, in my view, cannot come within the scope of the arbitration agreement. I refer to s. 9(1) of the AA as follows:

> 9(1) *In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> (emphasis added).

It is clear that under s. 9(1) of the AA, the arbitration agreement concerns "all or certain disputes which have arisen or which may arise between" the defendant and TIMB regarding the BPTA. The arbitration agreement cannot include the question on effect of High Court's confirmation order which involves a question of law in respect of the construction of the relevant provisions of the IA.

[54] TIMB has relied on ss. 8 and 10 of the AA. Sections 8 and 10(1) of the AA read as follows:

> **Extent of court intervention**
>
> 8 **No court shall intervene in matters governed by this Act, except where so provided in this Act.**
>
> 10 **Arbitration agreement and substantive claim before court**
>
> (1) *A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> (emphasis added).

A Section 8 of the AA does not apply in this case as this case does not concern AA. Section 10(1) of the AA only applies if the arbitration agreement applies to the four questions. As explained above, the arbitration agreement cannot apply to the question on effect of High Court's confirmation order. Consequently, s. 10(1) of the AA has no relevance to the third party notice.
B Even if the arbitration agreement applies to the four questions, TIMB can only apply to stay the third party proceedings under s. 10(1) of the AA and not to strike out the third party notice.

[55] All the cases cited by TIMB do not apply in the third party proceedings which concern the question on effect of High Court's
C confirmation order.

[56] Premised on the above reasons, I am constrained to dismiss court encl. No. 8 with costs.

Defendant Is Not Estopped From Issuing Third Party Notice

D **[57]** I am not able to accept TIMB's submission that the defendant is estopped from issuing the third party notice due to the fact that the defendant has obtained the stay order dated 22 February 2012 and has filed the arbitral proceedings. This is because the OS and the arbitral proceedings concerned solely the IBNR issue which is different from the question on effect of High
E Court's confirmation order. Furthermore, this suit is filed by the plaintiff subsequent to the stay order dated 22 February 2012 and the arbitral proceedings. The third party proceedings is instituted as a direct consequence of this suit. In any event, the defendant had filed the jurisdictional application for the arbitral tribunal to decide a preliminary issue that TIMB's liability
F to contribute to the MMIP pool, did not fall within the arbitral tribunal's jurisdiction. In other words, the defendant has always taken a consistent stand that the arbitral proceedings are separate from the third party proceedings.

Is Court Deprived Of Jurisdiction By Arbitration Agreement?

G **[58]** Before ending this judgment, I need to clarify that the High Court's civil jurisdiction is derived as follows:

(i) Article 121(1) of the FC provides that the High Court "shall have such jurisdiction and powers as may be conferred by or under federal law". The term "federal law" has been defined in art. 160(2) of the FC as:
H

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII of the FC (which provides for temporary and transitional provisions); and

I (b) any Act of Parliament; and

(ii) the civil jurisdiction of the High Court is provided in s. 23(1)(a) to (d), (2) and 24(a) to (f) of the Courts of Judicature Act 1964 (CJA).

[59] It is clear from art. 121(1) of the FC read with s. 23(1)(a) to (d) of the CJA, that the High Court has jurisdiction to hear the third party proceedings and such a jurisdiction is not ousted by the arbitration agreement. In fact, s. 10(1) of the AA recognises the High Court's jurisdiction to stay a suit and refer the parties to arbitration if the suit concerns a matter which is the subject of an arbitration agreement. In the Federal Court case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113, at pp. 128-129, Augustine Paul FCJ held that as a general rule, the jurisdiction of superior courts is not taken away except by express words or by necessary implication.

[60] In view of the above reasons, I have to reject TIMB's contention that due to the existence of the arbitration agreement, this court has no jurisdiction to decide on the third party proceedings.

Court's Decision

[61] Premised on the above reasons:

(i) court encl. No. 6 is allowed with costs; and

(ii) court encl. No. 8 is dismissed with costs.